KOBRA TABA SEIDALI

v.

PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
MOHD ZAWAWI SALLEH JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: B-05-79-03-2012]
23 OCTOBER 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Conviction and sentence - Appeal against - Prima facie case - Whether established - Failure of prosecution to call material witness or submit copy of witness statement - Criminal Procedure Code, s. 112 - Whether fatal - Failure to rebut 'Alcontara Notice' - Whether opportunity of fair trial compromised by prosecution - Failure of trial judge to consider defence case in right perspective - Whether decision to convict safe*

The appellant and several family members had arrived at the Kuala Lumpur International Airport ('KLIA') where drugs were seized from their bags. The appellant was thus charged with trafficking in 1,760g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant was found guilty of the said charge and was thus convicted and sentenced. Hence, this appeal. It was the appellant's submission that the trial judge had erred when she ruled that the prosecution had proved a *prima facie* case of trafficking at the end of the prosecution's case. It was the appellant's defence that the drugs belonged to one Maryam, another member of the group. The appellant also alleged that the trial judge had not considered his defence in the right perspective though '*Alcontara* Notice' was given, and the judgment was perverse when the trial judge ruled the defence was an afterthought. The issues that arose were, *inter alia* (i) whether the trial judge had erred when she failed to recognise that the failure of the prosecution to call Maryam or at least tender her statement under s. 112 of the Criminal Procedure Code ('CPC') had compromised the case for the prosecution; and (ii) whether the trial judge had misdirected herself when she failed to appreciate the defence.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) If the witness could not be produced by the prosecution, it would be appropriate for the prosecution to hand over the s. 112 statement recorded from the witness to whittle down any complaint by the defence to invoke s. 114(g) of the Evidence Act 1950 as in the instant case. The failure of the prosecution to produce Maryam as a witness or hand over a copy of the witness statement to the defence to be used if it was favourable as part of the defence exhibit at the defence stage was fatal. Further, the failure of the prosecution to rebut the '*Alcontara* Notice' or give appropriate reason to do so was fatal (*Alcontara Ambross Anthony v. PP*, refd; *Munuswamy Sundar Raj v. PP*, refd). Herein, the opportunity of a fair trial had been compromised by the prosecution. (paras 18 & 19)

(2) The failure of the trial judge to consider the defence case in the right perspective clearly showed that *Radhi*'s direction (*Mohamad Radhi Yaakob v. PP* [1991] 1 LNS 103) had been breached compromising the integrity of the decision-making process thereby making the decision unsafe. Such an error on the facts of the case could not be saved by the application of s. 60 of the Courts of Judicature Act 1950 (*PP v. Aszzid Abdullah*, refd; *Tong Kam Yew & Wang Wee Cheng v. PP*, refd; *Chin Kek Shen v. PP*, refd). Thus, the conviction and sentence of the High Court was squashed (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan beberapa orang ahli keluarganya telah tiba di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') di mana dadah berbahaya telah dirampas daripada beg mereka. Perayu kemudiannya dituduh mengedar 1,760g methamphetamine, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu didapati bersalah atas pertuduhan tersebut dan disabitkan dan dijatuhkan hukuman. Oleh itu, rayuan ini adalah hujahan perayu bahawa hakim bicara terkhilaf dalam memutuskan bahawa pihak pendakwaan telah membuktikan kes *prima facie* pengedaran pada akhir kes pendakwaan. Perayu, dalam pembelaannya menyatakan bahawa dadah tersebut adalah milik seorang yang

bernama Maryam, salah seorang ahli kumpulan itu. Perayu juga mendakwa bahawa hakim bicara tidak mempertimbangkan pembelaan dalam perspektif yang betul walaupun 'Notis *Alcontara*' telah diberikan dan penghakiman adalah tidak munasabah apabila hakim bicara memutuskan pembelaan adalah suatu fikiran semula. Isu-isu yang timbul adalah, antara lain (i) sama ada hakim bicara telah khilaf apabila gagal mengambilkira bahawa kegagalan pihak pendakwaan memanggil Maryam atau mengemukakan kenyataannya di bawah s. 112 Kanun Tatacara Jenayah ('KTJ') telah menjejaskan kes pendakwaan; dan (ii) sama ada hakim bicara telah tersalah arah apabila gagal mempertimbangkan kes pembelaan.

Diputuskan (membenarkan rayuan):
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Jika saksi tidak dapat dikemukakan oleh pihak pendakwaan, ia adalah wajar bagi pihak pendakwaan memberikan kenyataan s. 112 yang telah direkodkan daripada saksi untuk menolak aduan pembelaan untuk menggunakan s.114(g) Akta Keterangan 1950 seperti dalam kes ini. Kegagalan pihak pendakwaan untuk mengemukakan Maryam sebagai saksi atau mengemukakan salinan kenyataan saksi kepada pihak pembelaan untuk digunakan jika ia memihak kepada ekshibit pembelaan pada peringkat pembelaan adalah menjejaskan. Seterusnya kegagalan pihak pendakwaan untuk menyangkal 'Notis *Alcontara*' atau memberi alasan yang sesuai berbuat demikian juga adalah menjejaskan (*Alcontara Ambross Anthony v. PP*, dirujuk; *Munuswamy Sundar Raj v. PP*, dirujuk). Di sini, peluang perbicaraan yang adil telah dijejaskan oleh pihak pendakwaan.

(2) Kegagalan hakim bicara untuk mempertimbangkan kes pembelaan dalam perspektif yang betul menunjukkan bahawa arahan *Radhi* (*Mohamad Radhi Yaakob v. PP* [1991] 1 LNS 103) telah dilanggar seterusnya menjejaskan integriti proses menjadikan keputusan dan dengan itu membuat keputusan yang dibuat tidak selamat. Kesilapan yang terdapat dalam fakta kes tidak boleh diselamatkan oleh penggunaan s. 60 Akta Mahkamah Kehakiman 1960 (*PP v. Aszzid Abdullah*, dirujuk; *Tong Kam Yew & Wang Wee Cheng v. PP*, dirujuk; *Chin Kek Shen v. PP*, dirujuk). Oleh itu, sabitan dan hukuman oleh Mahkamah Tinggi dibatalkan.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Ang Kian Chai v. PP & Another Appeal [2012] 4 MLRA 456 ***(refd)***
Cheng Swee Tiang v. PP [1964] 1 LNS 19 FC ***(refd)***
Chin Kek Shen v. PP [2013] 7 CLJ 435 CA ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Munuswamy Sundar Raj v. PP [2013] 1 LNS 183 CA ***(refd)***
PP v. A Rashid Ismail [2001] 1 AMR 1149 HC ***(refd)***
PP v. Aszzid Abdullah [2008] 1 MLJ 281 ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Sim Kay Chay [2008] 1 CLJ 838 HC ***(refd)***
PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)***
Pramod Mandal v. State of Bihar (SC) [2004] 4 LRI 24 ***(refd)***
Public Prosecutor v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC ***(refd)***
Public Prosecutor v. Mohd Jamil Yahya & Anor [1993] 1 LNS 95 HC ***(refd)***
R v. Sang [1980] AC 402 ***(refd)***
Tong Kam Yew & Wang Wee Cheng v. PP [2013] 4 CLJ 470 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, s. 112
Evidence Act 1950, ss. 5, 32(1)(i), (j), 114(g)

For the appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman; DPP

[Appeal from High Court, Shah Alam; Suit No: 45A-35-2011]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's appeal against conviction and sentence for trafficking of drugs, came up for hearing on 22 August 2013 and on the same day upon hearing, the appeal was allowed. My learned brothers Mohtarudin bin Baki JCA and Mohd Zawawi bin Salleh JCA have read the draft judgment and approved the same. This is our judgment.

[2] It is important to note that the appellant and family members arrived at KLIA and drugs were seized from their bags. And the appellant's defence was that the drugs belonged to another member ("Maryam") of the group and the prosecution did not call

that person as witness or tender her s. 112 of the Criminal Procedure Code statement and in consequence lost the opportunity of a fair trial.

[3] In addition the appellant's allegation is that the learned trial judge had not considered his defence in the right perspective though '*Alcontara* Notice' was given and the judgment was perverse when the learned trial judge ruled the defence was an afterthought.

[4] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record. (See *Pramod Mandal v. State of Bihar (SC)* [2004] 4 LRI 24; *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364; [2013] 3 MLJ 328).

[5] The issues raised in this case is related to whether the learned trial judge has justly and fairly considered the defence case and whether the conviction is safe.

[6] The charge reads as follows:

> Bahawa kamu pada 02 Disember 2010, jam lebih kurang 10.45 malam di kawasan tuntutan bagasi, Aras 3 Ketibaan, KLIA di dalam daerah Sepang di dalam negeri Selangor Darul Ehsan didapati telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1760 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Brief Facts

[7] Learned counsel for the appellant had summarised the facts and it will save much judicial time if it is repeated verbatim. The summary *inter alia* reads as follows:

> The main witness for the prosecution is SP1 (Det. Zulkefli bin Zainal). His evidence can be summarized as follows: that on 2-12-2010 at about 10.45 pm he was on duty on the 3rd level of the arrival hall near the baggage claim area of the KLIA airport. He was on routine duty together with five other police

A personnel. At that point of time SP1 noticed a group of five persons comprising of one male adult, two female adults and two children. The three adults were pushing two trolleys with two baggages on each trolley. The group of five were proceeding out of the airport and were near the customs scan machine.

B SP1 approached them, identified himself and at the same time detained them. He requested the adult male to produce his passport. He was identified as Jalil. SP1 wanted to examine them further and requested SP5 (Abdul Rahman) and Det. Nor Reshiam to escort all five of them to the Narcotics office nearby.

C A body search was done on the appellant. Nothing incriminating was found. SP1 then proceeded to search the baggages. He started with the black bag (Apuabm - Ex. P13). P13 had a flight tag registered in the name of Marzivemiss Taba (P13A) bearing No. RB069818. Inside P13, amongst the clothings SP1 found four D bottles of shampoo bottles (Ex. P36A, P36B, P36C and P36D). The clothings in the bag were marked as P13 (1-14).

SP1 found that the contents of these bottles contained liquids. He then tested a bit of the contents of each of the bottle with the aid of a test kit and found that the results were positive indicating E the presence of methamphetamine.

Next, SP1 examined the green bag which was plastic wrapped (P14). It carried a flight tag bearing No. RB 069819 (P14B). Amongst the clothes (P14C (1-10)) were two shampoo bottles (P35(A) and P35(B)). Similar tests were conducted and they F yielded the same results.

SP1 then proceeded to examine a blue Samsonite bag belonging to the Appellant. Nothing incriminating was found. This bag was not produced.

G The next bag to be checked was a Reebok bag (P15). It carried a flight tag bearing the Appellant's name (P15A). Amongst the clothings (P15 (1-15)). SP1 found three bottles (P37(A), P37(B) and P37(C)). Similar tests were done and the results were positive indicative of methamphetamine.

H The last bag to be searched was the handbag (Nose - P16). Inside P16, SP1 found one bottle (P37D) and the initial test conducted by SP1 again found that it was positive. The other items in the bag were marked as P16 (1-12).

I

All the exhibits including the bottles were then marked and brought back to the Sepang police station and were handed over to the investigating officer. All 5, including the children, were also brought to the police station. Only the Appellant and Jalil were charged for these offences.

In short, the appellant was charged for trafficking in the four bottles of drugs, of which three bottles were found in the Reebok bag (P15) and one bottle found in the Nose handbag (P16).

In this case, a total of ten bottles were recovered from 4 bags. For the remaining six bottles, 4 bottles were in the Apuabm bag (P13) belonging to Maryam Niazi Soleiman (Maryam) and 2 bottles in the green bag (P14) for which Jalil was charged.

Maryam, the wife of Jalil, was not charged but was released together with the two children.

[8] The appellant's petition of appeal *inter alia* reads as follows:

(1) The learned trial judge misdirected herself when she convicted the appellant for the offence of trafficking and sentenced her to death.

(2) The learned trial judge erred when she ruled that the prosecution has proven a *prima facie* case of trafficking at the end of the prosecution's case.

(3) The learned trial judge erred when she failed to resolve in favour of the appellant aspects of the evidence that speak in favour of the appellant.

(4) The learned trial judge erred when she failed to recognise that the failure of the prosecution to call Maryam Niazi Soleiman (Maryam) or at least tender her s. 112 statement has compromised the case for prosecution.

(5) The learned trial judge misdirected herself when she relied on "deemed possession" under s. 37(d) and the definition section under s. 2 to find that a *prima facie* case of trafficking has been proven.

(6) The learned trial judge erred when she failed to appreciate the defence case.

(7) The learned trial judge misdirected herself when she failed to hold at the end of the defence case that the failure of the prosecution to call Maryam or to tender her s. 112 statement has created a reasonable doubt in the prosecution's case.

A (8) The learned trial judge erred in that she should have invoked s. 114(g) of the Evidence Act 1950 against the prosecution at the end of the defence case.

(9) The learned trial judge erred in law when she did not conduct a maximum evaluation on the prosecution's case.

B

(10) The learned trial judge erred in law when she criticised the appellant for not disclosing to the police that Maryam was the trafficker at the time of her arrest.

(11) The learned trial judge erred in law when she criticised the C defence of the appellant as a denial and an afterthought.

(12) The learned trial judge erred in law when she did not adhere to the approach as laid down in *Mat v. PP* [1983] MLJ 263.

D **[9]** Learned counsel in the written submission had limited the grounds of appeal to three issues only. It can be summarised as follows: (i) doubts as to exhibits; (ii) failure to produce Maryam or tender her s. 112 statement; (iii) failure to appreciate the defence.

E **Exhibit**

[10] On the factual matrix of the case we do not find any merits as to the submission in relation to the exhibits. [see *Natcha Dabkaew v. Public Prosecutor* [2013] (K-05-177-07-2012)].

F **Section 112 Statement**

[11] Learned counsel's submission that the prosecution should have produced s. 112 statement of Maryam in reliance of three cases namely: (i) *PP v. Chin Leong Foo* [2000] 4 CLJ 649; (ii) *PP* G *v. A Rashid Ismail* [2001] 1 AMR 1149; (iii) *Ang Kian Chai v. PP & Another Appeal* [2012] 4 MLRA 456 and have it admitted under s. 32(1)(i) of the Evidence Act 1950, have no merit.

[12] It is essential to note that s. 32(1)(i) must be read H conjunctively with (j) and is only related to public officers and not witnesses. Section 32(1)(i) and (j) was dealt by Hamid Sultan JC (as he then was) in *PP v. Sim Kay Chay* [2008] 1 CLJ 838; [2007] 5 MLJ 309 where he had this to say:

I Whether ss. 32(1)(i) and (j) must be read conjunctively or disjunctively is a matter of controversy and cases have been decided in both ways [*Public Prosecutor v. Michael Anayo Akabogu* [1995] 3 MLJ 42; *Public Prosecutor v. Mohd Jamil bin Yahya &*

Anor [1993] 3 MLJ 702; *Public Prosecutor v. Lam Peng Hoa & Anor* [1996] 5 MLJ 405]. If it is read conjunctively, then the new provision is only limited to the statements made by public officers. On the other hand, if it is read disjunctively, then it relates to a wide variety of statements. Jeffrey Tan JC (as he then was) stated in *Public Prosecutor v. Michael Anayo Akabogu* that it is trite that any ambiguity in the language of provisions leading to proof in criminal proceedings, such as ss. 32(1)(i) and (j), is to be narrowly construed.

[13] Section 32 of the Evidence Act 1950 states:

(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(a) ...

to

(h) ...

(i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; and

(j) where the statement was made by a public officer in the discharge of his duties.

[14] Section 32 deals with statements of persons who cannot be called as witnesses, on the ground that: (a) they are dead; (b) they cannot be found; (c) they have become incapable of giving evidence; (d) their attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the court unreasonable. This section previously contained 8 exceptions to the hearsay rule. Under the 1993 Amendment (A851) of the EA 1950, ss. 32(i) and (j) have been included which are only applicable in criminal proceedings. The statements which are to be admitted should have been made under the particular circumstances stated in section before they

A are made relevant under s. 5 of the EA 1950. Before admitting any piece of evidence on the grounds stated above, the fact must be proved strictly and the court must be fully satisfied. The provision of ss. 32(1)(i) and (j) was considered by the court in the case of *Public Prosecutor v. Mohd Jamil bin Yahya & Anor* [1993] 1 B LNS 95; [1993] 3 MLJ 702, where KC Vohrah J (as he then was) observed at p. 708:

> In respect of paras. (a)-(h), of s. 32(1), they are in *pari materia* with paras. (1)-(8) of s. 32 of the Indian Evidence Act and the principle for having the original eight exceptions to the hearsay C rule is explained in *Sarkar on Evidence* (1990, Reprint) at p. 370, quoting from Wigmore (ss. 1420-1422):
>
> > The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that D the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous: it may be sufficiently clear, in that instance, that the statement offered E is free from the risk, of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment - for example, by reason of the death of the declarant, so that, if his testimony is to be used at all, there F is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.
>
> G To be noted too, is that the principle of impeaching and discrediting or corroborating the declarant of a dying declaration is recognised by a statutory provision and in fact extends to all declarants of statements made admissible under ss. 32 and 33 of the Evidence Act 1950 as s. 158 of the Evidence Act 1950 provides that 'whenever any H statement relevant under ss. 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and I had denied upon cross-examination the truth of the matter

> suggested.' In my view, the weight and degree of credit to be attached to a statement by a declarant under para. (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a jaundiced view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a mandatory sentence of death on conviction on the charge.

[15] In *Public Prosecutor v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747; [1996] 5 MLJ 405, Kang Hwee Gee J was of the view that ss. 32(1)(i) and (j) of the EA 1950 should be read disjunctively and said that the word 'and' which joins sub-s. (i) and (j) could admit of no more significance than an exposition of the draftsman's preference of a conjunction as an ending to all the provisions in sub-s. (1) of s 32. Further, the learned judge said that it is clear that the language used in ss. 32(1)(i) and (j) is so plain that it is hardly necessary to embark on the task of interpretation.

[16] It is elementary principle of common law that hearsay evidence which is incapable of being tested by cross-examination to determine its veracity is not admissible to determine the guilt. And if it is so made admissible it may be for the limited purpose to corroborate some material evidence. Anything less will be abhorrent to notion of justice and fair play. [See *Article* [2000] 4 MLJ lxv]. **The position is the same in all civil society.** (Emphasis added).

[17] Section 32 of EA 1950 to some extent permits hearsay evidence to be admissible in civil and criminal cases. The section actually deals with common law exception to the hearsay rule until the introduction of ss. 32(1)(i) and (j) attempting to introduce a new inroad to the hearsay exception. If the exception is limited to public officers when read conjunctively there is very little the defence can complain of unless the statement is used to establish a substantive element of the offence, as compared to the nexus to the charge. However, when it relates to witness statement and is introduced by the prosecution as substantive evidence without calling the maker the integrity of administration of criminal justice

will be compromised. Parliament as well as Parliamentary draftsman will have never intended such an approach and if it is so they would ought to have rightly stated so without using the word 'and' which is often used to connect the sentence taking into consideration (a) to (h) which stands disjunctively, and if (i) and (j) is meant to be disjunctive 'and' need not be used at all. Cases such as *Lam Peng Hoa* only considered (i) and (j) and failed to consider s. 32 as a whole as well as the underlining jurisprudence relating to hearsay rule and liberty of the subject and the constitutional guarantees to achieve fair trial by means of procedural law. (See *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301). Even if it is to be read disjunctively the court has the discretion to exclude prejudicial evidence or give low probative value (See *R v. Sang* [1980] AC 402; *Cheng Swee Tiong v. PP* [1964] 1 LNS 19; [1964] 30 MLJ 291). If low probative value is given to that piece of evidence then it becomes a worthless piece of evidence independently when applying the maximum evaluation and beyond reasonable test. When it is not used as a substantive evidence but only for purpose of corroboration it may carry some probative value to show nexus.

[18] Having said that, if the witness cannot be produced by the prosecution it will be appropriate for the prosecution to hand over the s. 112 statement recorded from the witness to whittle down any complaint by the defence to invoke s. 114(g) of EA 1950 as in the instant case.

[19] In the instant case, we take the view the failure of the prosecution to produce Maryam as a witness or hand over a copy of the witness statement to the defence to be used if it is favourable as part of the defence exhibit at the defence stage is fatal on the factual matrix of the case. In addition the failure of the prosecution to rebut the '*Alcontara* Notice' or give appropriate reason to do so is also fatal. [See *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; *Munuswamy Sundar Raj v. PP* [2013] 1 LNS 183; [2013] 5 MLJ 48]. In consequence we agree with learned counsel that an opportunity of fair trial has been compromised by the prosecution.

[20] The failure of the learned trial judge to consider the defence case in the right perspective clearly shows that *Radhi*'s direction has been breached compromising the integrity of the decision making process thereby making the decision unsafe and such an

error on the facts of the case cannot be saved by the application of s. 60 of Courts of Judicature Act 1964. (See *PP v. Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Wang Wee Cheng v. PP* [2013] 4 CLJ 470; [2013] 4 MLJ 888; *Chin Kek Shen v. PP* [2013] 7 CLJ 435; [2013] MLJU 266).

[21] For reasons stated above it is our considered view that it is not safe to convict. In consequence the appeal is allowed. The conviction and sentence of the High Court is squashed.